IN THE CIRCUIT COURT OF ST. LOUIS CITY
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
vs.	)	Case No. 22941-03706A-01
	)	
LAMAR JOHNSON,	)	
	)	
Defendant.	)	

STATE'S BRIEF IN SUPPORT OF COURT'S AUTHORITY
TO ENTERTAIN THE MOTION FOR NEW TRIAL

St. Louis Circuit Attorney Kimberly Gardner (the "Circuit Attorney"), in response to the Court's August 1, 2019 Order to Brief the Issues of the Court's Authority to Entertain the State's Motion for New Trial (the "Motion for New Trial" or "Motion"), submits the following:

INTRODUCTION

Mr. Johnson is an innocent man who has been wrongfully incarcerated for the past 25 years for a murder he did not commit. The State conducted an independent investigation into Mr. Johnson's case and found clear, convincing, and overwhelming evidence of innocence, government misconduct, and constitutional violations that deprived Mr. Johnson of a fair trial. *See* Motion for New Trial, Exh. 1 Report of the Conviction Integrity Unit. The State discovered errors so prejudicial that it is compelled to correct them, including:

(1) the concealment of more than $4,000 in payments to the sole eyewitness who had no opportunity to see and could not identify the fully masked assailants;

(2) the failure to disclose the complete criminal and informant history of the State's jailhouse informant;

(3) the fabrication of false witness accounts during the law enforcement investigation used to provide a motive that did not exist;

(4) the failure to conduct a thorough and competent investigation into the facts of the case;

(5) the use of improper and unconstitutional police investigation tactics; and,

(6) the presentation of false and misleading evidence to the jury and prosecutorial misconduct that further prejudiced Mr. Johnson and rendered the result of the trial fundamentally unfair.

The State, through its Motion for New Trial, has now shown to the Court what Mr. Johnson has known and suffered with for decades—his conviction was obtained through perjured testimony. This Court should exercise its jurisdiction and authority to grant a new trial based on the perjured and false testimony illuminated in the Motion or, at a minimum, order a hearing on the evidence set forth therein.

JURISDICTION AND AUTHORITY

I. The Trial Court Has Jurisdiction to Entertain the Motion.

Unquestionably, the Court has jurisdiction to entertain the Motion. In the watershed decision *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253-54 (Mo. 2009), the Missouri Supreme Court unequivocally stated that a circuit court's jurisdiction is not based upon or limited by any source other than the Missouri Constitution, and stated that a circuit court has plenary jurisdiction "over *all* cases and matters, civil and criminal." (Emphasis in original). In so ruling, the Missouri Supreme Court made clear that unlike federal courts, a circuit court's subject matter jurisdiction is *not* limited by statute or rule:

> Subject matter jurisdiction, in contrast to personal jurisdiction, is not a matter of a state court's power over a person, but the court's authority to render a judgment in a particular category of case. In the federal courts, unlike Missouri, subject matter jurisdiction is set forth in statutes passed

> within the authority granted to Congress by article III of the United States Constitution. Thus, pursuant to this constitutional authority, Congress has the power to increase or decrease the kinds and categories of cases heard in the federal courts.
>
> In contrast to the federal system, the subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution. Article V, section 14 sets forth the subject matter jurisdiction of Missouri's circuit courts in plenary terms, providing that "[t]he circuit courts shall have original jurisdiction over *all* cases and matters, civil and criminal. Such courts may issue and determine original remedial writs and shall sit at times and places within the circuit as determined by the circuit court."

Id. Here, the Court has subject matter jurisdiction to entertain the Motion for New Trial simply because it is a criminal "case or matter" and it was filed in this circuit court. *See Mercer v. State*, 512 S.W.3d 748, 751 (Mo. 2017), *as modified* (Apr. 4, 2017) ("Here, the circuit court had subject matter jurisdiction over Mercer's postconviction relief motion because it was filed in a circuit court. Mo. Const. art. V, sec. 14.").

Any prior decisions holding that the time requirements in Rule 29.11 impose a jurisdictional bar are no longer valid. *State v. Henderson*, 468 S.W.3d 422, 425 and n.4 (Mo. Ct. App. 2015) ("Several prior cases, most predating *J.C.W.,* erroneously treated Rule 29.11 time frames as jurisdictional."). Instead, the time requirements in Rule 29.11 simply function as "limits on remedies" for a convicted person to challenge his conviction. *J.C.W.,* 275 S.W.3d at 255. Since noncompliance with Rule 29.11 deadlines "is not a jurisdictional defect," the Circuit Attorney may waive any applicable deadlines, which she has done here. *State v. Henderson*, 468 S.W.3d 422, 425 (Mo. App. 2015); *see also State v. Oerly*, 446 S.W.3d 304, 307-10 (Mo. App. 2014) (noncompliance with Rule 29.11(c) is not a jurisdictional defect).

In *Henderson* for instance, the court found that the prosecution waived compliance with Rule 29.11(b) when it "twice pressed the trial court to consider the

untimely *Brady* claim," including by consenting on the record to the trial court's consideration of the defendant's motion and later stating that it had no objection. 468 S.W.3d at 425 & n.5. Here, the Circuit Attorney expressly waives any deadlines in 29.11 to the extent they are applicable, which is her exclusive prerogative. *See* RSMo. § 56.450. **Circuit Attorney — duties (St. Louis City)** ("The circuit attorney of the City of St. Louis shall manage and conduct all criminal cases, business and proceedings of which the circuit court of the city of St. Louis shall have jurisdiction.").

But the deadlines in 29.11 are not even applicable here. Rule 29.11 restricts only the ***remedies*** available to a convicted defendant to challenge his conviction; it does not restrict the remedies available to the Circuit Attorney to correct a manifest injustice. *See, e.g.,* Mo. Sup. Ct. R. 29.11(b) ("A motion for a new trial or a motion authorized by Rule 27.07(c) [governing application of a ***defendant*** for a new trial] shall be filed within fifteen days after the return of the verdict. On application of the ***defendant*** made within fifteen days after the return of the verdict and for good cause shown the court may extend the time for filing of such motions for one additional period not to exceed ten days.").

To rule otherwise would be inconsistent with the Supreme Court's rules of construction, *see* Mo. Sup. Ct. R. 19.03 ("Rules 19 to 36, inclusive, shall be construed to secure the ***just***, speedy and inexpensive determination of every criminal proceedings."); incompatible with the Circuit Attorney's statutory mandate to uphold the Constitution, *see* RSMo. § 56.550. **Circuit attorneys and assistants — oaths — duties** ("Before entering upon the duties of their office, the circuit attorney and said assistants shall be severally sworn to support the Constitution of the United States and the Constitution of Missouri, and to faithfully demean themselves in office."); and would infringe her

"broad, almost unfettered, discretion" to rectify an injustice. *See State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 398 (Mo. banc 2018).

II. The Circuit Attorney Is Duty-Bound to Move for a New Trial.

Once the prosecutor knows of clear and convincing evidence that a defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction to avoid manifest injustice. Model Rules of Prof'l Conduct r. 3.8(h). The U.S. Supreme Court has held that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976). The Supreme Court of Missouri has also recognized that a state attorney's "role is to see that justice is done—not necessarily to obtain or to sustain a conviction." *State v. Terry*, 304 S.W.3d 105, 108 n.5 (Mo. 2010). *See State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548-49 (Mo. 2003).

This is the position in which the Circuit Attorney now finds herself—the Circuit Attorney now has clear and convincing evidence establishing that Mr. Johnson was convicted of a crime that he did not commit. Accordingly, the Circuit Attorney must not only "promptly disclose that evidence to an appropriate court," Model Rules of Prof'l Conduct r. 3.8(g), but "must seek to remedy the conviction." Model Rules of Prof'l Conduct r. 3.8 cmt. 8; *see* ABA Report to the House of Delegates, No. 105B (Feb. 2008) ("The obligation to avoid and rectify convictions of innocent people, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors.")

The Circuit Attorney's duty as a "minister of justice" to ensure "procedural justice" is not circumscribed by time or place. Missouri Rules of Prof'l Conduct R. 4-3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."). Because the Circuit Attorney has become aware of evidence of government misconduct, perjured testimony, concealed exculpatory and impeachment evidence that is clearly material, and evidence of innocence, she is duty-bound to move for a new trial. *Id.*; *see also Napue v. People of State of Ill*., 360 U.S. 264, 269–70, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959) ("[T]he district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."); *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) ("Prosecutors have a special duty to seek justice, not merely to convict.").

III. The Trial Court Has a Duty to Entertain the Motion.

Where, as here, the Circuit Attorney has shown through its Motion clear and convincing evidence establishing that Mr. Johnson is not only actually innocent but that his conviction was secured through false testimony, the Court has a duty to entertain the Motion. *See Donati v. Gualdoni*, 216 S.W.2d 519, 521 (Mo. 1948) ("No verdict and resultant judgment, in any case, could be said to be just if the result of false testimony. The trial court had the duty to grant a new trial if satisfied that perjury has been committed and that an improper verdict or finding was thereby occasioned.").

"The starting point in any analysis of post-conviction relief based on perjury is the general rule that a conviction which results from the deliberate or conscious use by a

prosecutor of perjured testimony violates due process and must be vacated." *State v. Mims*, 674 S.W.2d 536, 538 (Mo. 1984) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959))(conviction reversed); *see also United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976); *Miller v. Pate*, 386 U.S. 1, 7, 87 S.Ct. 785, 788, 17 L.Ed.2d 690 (1967); *State v. Moore*, 435 S.W.2d 8, 16 (Mo. banc 1968); *Coles v. State*, 495 S.W.2d 685, 687 (Mo.App.1973).

Previous Missouri decisions should guide the Court in entertaining the Motion. In *Williams*, for instance, the Court determined that Williams was entitled to file a motion for a new trial and receive a hearing on the motion where Williams' evidence was "detailed" and "if believed, the newly discovered evidence would completely exonerate the defendant of any complicity in the crime for which he was convicted." *State v. Williams*, 673 S.W.2d 847 (Mo. App. E.D. 1984). In *Williams*, like here, the prosecutor agreed that the "information contained" in the motion "is true and accurate" and further agreed that the motion should be heard in the trial court. *Id.* at 848.

> Under the unique circumstances of this case, we are willing to overlook the time constraints of Rule 29.11 as they relate to the newly discovered evidence. The basis of the granting of relief for such reason is that it was not known, or could not reasonably have been discovered earlier. That this evidence was not discovered before the expiration of the time for the filing of a motion for new trial should not defeat the laudable concept of a new trial based on such evidence. This ruling may be subject to future limitation, ***but we see no reason for limitation where the State joins in the request for release***. Mindful though we are of the exclusivity of this Court's jurisdiction once a notice of appeal has been properly filed, ***we are equally cognizant of the perversion of justice which could occur if we were to close our eyes to the existence of the newly discovered evidence…[I]in light of the State's concession that the evidence exists, it should be heard***."

Id. (emphasis added).

Another guiding case is *State v. Mooney*, 670 S.W.2d 510, 514-15 (Mo. Ct. App. 1984), where a new trial was granted because perjured testimony related directly to the defendant's innocence:

> We believe this is a "proper case" [for a new trial even out of time] because the recantation, if such it is, came too late for the defendant to file a timely motion for new trial on the grounds of newly-discovered evidence. Although the judgment of the trial court is final for purposes of appellate review, and the trial court is without jurisdiction to entertain appellant's motion because the case is on appeal, we believe upon remand a motion for new trial should be permitted to be filed where the appellate process has not been completed, there is no evidence connecting the appellant with the crime other than the testimony of the victim who has allegedly recanted, and whose testimony is uncorroborated by any other evidence, where said newly discovered evidence did not become available during trial, and the recanting occurred under circumstances reasonably free from suspicion of undue influence or pressure from any source.

Id. at 516. The court remanded with instructions that Mooney be permitted to file a motion for new trial. The *Mooney* opinion recognized, as here, "[t]he victim whose testimony was the only evidence to establish the crime of which appellant was convicted has allegedly recanted." *Id.* at 514-515. The Court reaffirmed a trial court's authority and duty to correct a manifest injustice when one is presented through a motion for new trial:

> It would be patently unjust for a trial judge to refuse to grant a new trial in any case in which the accused was found guilty of a crime on the basis of false testimony, and the court "if satisfied that perjury had been committed and that an improper verdict or finding was thereby occasioned," . . . would be under a duty to grant a new trial. That is to say "[w]here it appears from competent and satisfying evidence that a witness for the prosecution has deliberately perjured himself and that without his testimony the accused would not have been convicted, a new trial will be granted."

Id. at 515 (quoting *State v. Harris*, 428 S.W.2d 497, 500 (Mo. 1983)).

ARGUMENT

As set forth above, the Circuit Attorney's jurisdiction and power to act rests in *all* criminal cases within the Twenty-Second Judicial Circuit. The Circuit Attorney is duty-

bound and constitutionally obligated to remedy Mr. Johnson's wrongful conviction. There cannot be a constitutional mandate and an ethical and professional obligation without a vehicle and a procedural mechanism. The Motion is the proper vehicle and this Court has authority and jurisdiction to hear and decide the Motion. Here, the Court should entertain the Motion for any of the following reasons.

I. Newly Discovered Evidence of Actual Innocence Renders the Verdict Improper and Unjust.

First, the Court should entertain the Motion because the circumstances in *Mooney* and *Williams*, as discussed above, exist here. The newly discovered evidence completely exonerates Mr. Johnson. The State has reviewed the evidence and conducted its own investigation and is convinced that Mr. Johnson is innocent and that repeated and prejudicial government misconduct occurred. These exceptional circumstances and the interests of justice warrant the granting of a new trial for Mr. Johnson or, at a minimum, a hearing on the Motion.

A new trial based on newly discovered evidence is warranted if the movant establishes that:

(1) The facts constituting the newly discovered evidence have come to the movant's knowledge after the end of the trial;

(2) Movant's lack of prior knowledge is not owing to any want of diligence on his part;

(3) The evidence is so material that it is likely to produce a different result at a new trial; and,

(4) The evidence is neither cumulative only nor merely of an impeaching nature.

State v. Whitfield, 939 S.W.2d 361, 367 (Mo. banc 1997). Evidence is "new" if it was "`not available at trial and could not have been discovered earlier through the exercise of

due diligence." *Osborne v. Purkett*, 411 F.3d 911, 920 (8th Cir. 2005) (quoting *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001). If a credible showing of actual innocence is made and is "strong enough to undermine the basis of the conviction" the continued imposition of the sentence is "manifestly unjust." *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. banc 2003).

The Missouri Supreme Court has provided a standard "to account for those rare situations…in which a petitioner sets forth a compelling case of actual innocence independent of any constitutional violation at trial." *Id*. The evidence of innocence must "make a clear and convincing showing of actual innocence that undermines confidence in the corrections of the judgment." *Id.* Evidence is clear and convincing when it "instantly tilts the scales in the affirmative when weighed against the opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true." *Id*. At 548.

Here, the Circuit Attorney has uncovered new evidence that was not available to the defense at trial and could not have been discovered by the Mr. Johnson any earlier. Among other things, the affidavits of Campbell, Howard, McClain, Cooper, and Elking as well as the personal writings of Campbell and Elking could not have been known to Mr. Johnson at trial. *See* Motion, Exhs. 8, 16, 17, 18, 19, 30, 31, 32, 43. Furthermore, Mr. Johnson has attempted to collect newly discovered evidence for years, and the State concealed and failed to disclose at nearly every opportunity. Mr. Johnson cannot be faulted for failure to be diligent.

The evidence discovered since Mr. Johnson's trial completely exonerates him, *see* Motion ¶¶ 86-173, and therefore the newly discovered evidence is material and neither cumulative nor merely impeaching. The evidence of innocence was unavailable to Mr.

Johnson because the State failed in its duty to investigate the crime, presented an identification that was manufactured, false, and incentivized, presented false testimony relating to the alibi, and failed to disclose exculpatory evidence in violation of *Brady* and its progeny. The *Whitfield* factors are more than satisfied by the detailed evidence the State presented in its Motion.

II. Perjury By Material Witnesses Renders The Verdict Improper And Manifestly Unjust.

Second, the Court should entertain the Motion because clear and convincing evidence shows that State witnesses deliberately perjured themselves and, without this false testimony, Mr. Johnson would not have been convicted.

"The granting of a new trial on perjury grounds requires a showing that the witness willfully and deliberately testified falsely." *March v. Midwest St. Louis, L.L.C.*, 417 S.W.3d 248, 255 (Mo. 2014) (internal citation omitted). "Even when a witness has provided false testimony, a trial court may grant a new trial only when it is satisfied that the perjury was material in character as to render an improper verdict." *Id.* at 256; *see Mooney*, 670 S.W.2d at 516 ("Where it appears from competent and satisfying evidence that a witness for the prosecution has deliberately perjured himself and that without his testimony the accused would not have been convicted, a new trial will be granted."). "[T]he determination of the materiality of alleged false testimony is a question of law for the determination of the court." *March*, 417 S.W.3d at 256. 239.

Perjured testimony is "illegal testimony, and the court may grant a new trial when illegal testimony has been admitted, Mo. R. Crim P. 27.19(a)(1)[.]" *State v. Harris*, 428 S.W.2d 497 (Mo. 1968). In order to vacate a judgment claimed to have been procured by false testimony under the rule, it is a requirement that it "be alleged and proved that the

State knowingly used false testimony or knowingly failed to correct testimony it knew to be false." *Id.*

Here, the Motion establishes that the State's star witness at trial, Elking, perjured himself at Mr. Johnson's trial. *See* Motion, Exh. 5, p. 5-6; Exh. 27, p. 1-5; Exh. 24, p. 1-4; Exh. 8, p. 1-8; Exh. 15, p. 9, 124-32. Elking recanted his identification—an identification that was manufactured and false. The evidence pertaining to Elking's false identification and perjured testimony is detailed in the Motion at □□ 127 -157. Elking has admitted in personal writings, affidavits, and deposition testimony that he was never able to make an identification because the gunmen wore masks that covered their heads, foreheads, mouths, cheeks, ears, most of their noses. *See* Motion, Exh. 15, p. 50-52; Exh. 9, p. 190.

Elking told Detective Nickerson that he could not see the faces of the gunmen and was would not be able to make an identification. *See* Motion, Exh. 5, p. 5; 2003 Letter from Elking to Mr. Johnson, p. 3; 2003 Elking Affidavit, p. 1-2; 2010 Elking Affidavit, p. 3-4; 2019 Elking Deposition, p. 71, 74-75, 82-83, 85. Elking continued to tell the police that he did not know any of Boyd's associates and did not recognize or know the gunmen. *See* Motion, Exh. 5, p. 5; 2003 Letter from Elking to Johnson, p. 3; 2003 Elking Affidavit, p. 1-2; 2010 Elking Affidavit, p. 3-4; 2019 Elking Deposition, p. 71, 74-76, 82-83.

Detective Nickerson promised Elking money if he agreed to be a witness against Mr. Johnson even though Elking told him he was unable to make an identification. *See* Motion, Exh. 5, p. 6; 2003 Letter from Elking to Mr. Johnson, p. 4; 2003 Elking Affidavit, p. 3; 2010 Elking Affidavit, p. 5, 7; 2019 Elking Affidavit, p. 100. Elking

finally succumbed to the pressure, intimidation, and promise of money and agreed to a statement identifying Mr. Johnson that was crafted by Detectives Nickerson, Stittum, and Bailey. *See* Motion, Exh. 2, p. 50; Exh. 5, p. 6; 2003 Letter from Elking to Mr. Johnson, p. 4; 2003 Elking Affidavit, p. 3; 2010 Elking Affidavit, p. 6; 2019 Elking Deposition, p. 100-03).

Elking testified falsely against Mr. Johnson and he knew it was false at the time he testified. *See* Motion, Exh. 5, p. 5-6; Exh. 27, p. 1-5; Exh. 24, p. 1-4; Exh. 8, p. 1-8; Exh. 15, p. 9, 124-32. The newly discovered evidence that Elking committed perjury when he identified Mr. Johnson is overwhelming:

(1) In 2003, Elking wrote a letter to Reverend Rice admitting that he testified falsely against Mr. Johnson. *See* Motion, Exh. 5, p. 5-6.

(2) In a series of letters to Mr. Johnson, Elking admitted that his identification was coerced and false. *See* Motion, Exh. 27.

(3) In 2003, Elking signed an affidavit stating that he testified falsely. *See* Motion, Exh. 24;

(4) In 2010, Elking signed an affidavit stating that he testified falsely. *See* Motion, Exh. 8.

(5) In 2019, Elking met with the CIU and admitted that he could not see the assailants, never had any ability to identify the assailants, and testified falsely when he identified Mr. Johnson.

(6) In 2019, Elking testified under oath that his identification of Mr. Johnson was false and manufactured. *See* Motion, Exh. 15.

(7) Receipts of payment from the State to Elking, never disclosed to the defense, corroborate Elking's account. *See* Motion, Exh. 12.

Without Elking's identification of Mr. Johnson, there would have been no arrest and no charges filed against Mr. Johnson. Elking was the only witness to the crime. He

was an essential, material witness for the State and there can be no doubt that Mr. Johnson was prejudiced by his false identification and perjured testimony.

In another instance of prejudicial perjured testimony, Detective Nickerson testified falsely regarding Mr. Johnson's alibi, Detective Nickerson knew it was false, and ACA Dwight Warren knew or should have known it was false. The evidence supporting Mr. Johnson's alibi and describing the impossibility of Detective Nickerson's testimony is summarized in the Motion at □□ 103-113. Without Detective Nickerson's false testimony, Mr. Johnson's alibi evidence would have undoubtedly proved his innocence. *See* Motion, ¶¶ 231-240; 266-269.

It was undisputed that Mr. Johnson was at an apartment shared by Anita Farrow and Robert Williams, located at 3907 Lafayette Avenue when the murder occurred with the exception of about five minutes. *See* Motion ¶¶ 9; 76-82. Nonetheless, the State presented perjured testimony, through Detective Nickerson in rebuttal, that Mr. Johnson could have traveled from 3907 Lafayette to the scene and killed Boyd in "no more than five minutes," and that he had personally driven the route anywhere from "20-50 times." *See* Motion ¶¶ 111; 235. This testimony was false and Detective Nickerson knew it was false. *See* Motion ¶ 236. The undisputed evidence proves that the assailants arrived on foot and simple distance calculations contradict Nickerson's false testimony regarding Mr. Johnson's alibi. *See* Motion ¶¶ 112-113, 194,

The knowingly perjured testimony did not end with Elking and Detective Nickerson. William Mock, a man with an extensive criminal history and history of cooperating as a jailhouse informant, was incarcerated in the City Jail holdover unit at the same time Mr. Johnson and his co-defendant were housed there. *See* Motion, Exh. 2, p.

25, 51. On November 5, 1994, just two days after Elking made a false identification of Mr. Johnson and gave a manufactured statement, Mock notified a jailer that he had information to share with the homicide unit. *Id*.

Mock claimed that he overheard incriminating conversations involving three inmates about a murder. The State argued at trial that Mock had no motive to lie and that he expected little for his testimony against Mr. Johnson. *See* Motion, Exh. 9, p. 352-53. That testimony was false, and ACA Dwight Warren knew it was false.

In truth, Mock expected much in return for his testimony. In an undisclosed letter from Mock to ACA Dwight Warren dated June 3, 1994, he stated

> I don't believe that anyone in the legal system will disagree with the value of my testimony in this trial as opposed to the conviction that I am now serving. I am willing to testify as long as I don't have to return to the Department of Corrections once I testify. I can't I won't live in protective custody or any institution after I testify. I am serving a five year sentence for CCW, which I have been serving since 1993. I feel my testimony is worth a pardon by Mr. Carnahan or a reduction in my sentence…I will uphold my end of the situation as I am certain you will fulfill your obligations to me.

See Motion, Exh. 37, p. 1-2.

In a series of undisclosed, exculpatory, and impeaching correspondence between Mock and ACA Dwight Warren, several letters were written by ACA Dwight Warren on Mock's behalf: to remedy disciplinary incidents involving Mock, to request transfers within the DOC to preferred prisons, and to make recommendations for release to the parole board. *See* Motion, Exh. 37. None of these considerations or favors were disclosed to the defense and Mock lied about his expectation of benefit to the jury.

Mock further testified falsely about his criminal history and the State did not correct the false record offered to the jury. A summary of Mock's criminal history was

attached to the Motion at Exhibit 34 and includes a number of arrests and convictions, both felony and misdemeanor, that were concealed from the defense. Among them: forgery, fraud, burglary, assault, multiple DUIs, larceny, escape, and stealing. *Id*.

The State did not disclose that Mock was an incentivized jailhouse informant for the State in 1992 in the prosecution of Joseph Smith. Mock testified, in exchange for a reduction in sentence, that he overheard a jailhouse murder confession while housed in the Jackson County jail. *See* Motion, Exh. 38. When Mock was specifically asked whether he had been a witness or testified in a criminal case—he lied—and the State did not correct the record:

> Q. Have you ever testified before?
> A. No, I haven't.
> Q. Have you ever given a deposition?
> A. No, I haven't.
> Q. Have you ever been a witness in a criminal case before?
> A. No, I haven't.

See Motion, Exh. 25, p. 5.

Mock's testimony was perjured in a number of instances and ACA Dwight Warren knew it, imposing on the prosecutor a duty to correct the false testimony. "A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility to correct what he knows is false and elicit the truth." *Napue*, 360 U.S. at 264 (1959) (internal quotations and citations omitted). The State is now fulfilling this duty.

As the Circuit Attorney has shown with credible and overwhelming evidence, Elking, Detective Nickerson, and Mock knowingly testified falsely at Mr. Johnson's trial. For these reasons, the Court should grant the Motion.

III. The Circuit Attorney Incorporates the Arguments Set Forth in The Motion for New Trial and Amicus Brief.

Finally, to avoid repetitious briefing, the Circuit Attorney adopts herein the arguments previously set forth in the Motion for New Trial and the Brief of *Amici Curiae* in Support of the State's Motion for New Trial.

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By:

/s/ Jeffrey Estes
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CERTIFICATE OF SERVICE

I hereby certify that it is my belief and understanding that counsel and parties are participants in the Court's e-filing program and that separate service of the foregoing document is not required beyond the Notification of Electronic Filing to be forwarded on August 15, 2019 upon the filing of the foregoing document.

/s/ Jeffrey Estes
Jeffrey M. Estes